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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEL JAY UGALINO, Defendant and Appellant.	C055469 (Super. Ct. Nos. 05f07620, 06f02820)

APPEAL from a judgment of the Superior Court of Sacramento County, Alan G. Perkins, Judge. Reversed in part and affirmed in part.

Donald Masuda and Kenny N. Giffard for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Paul E. O'Connor, Alison Elle Aleman, and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts I.A., I.B., I.C.1. and II of the Discussion.

A jury found defendant Del Jay Ugalino guilty of the following crimes: (1) first degree residential burglary (Pen. Code, § 459); (2) attempted robbery of Joshua Johnson (Pen. Code, §§ 664/211); (3) attempted robbery of Jessie Rider (Pen. Code, §§ 664/211); (4) possession of a controlled substance for sale (Health & Saf. Code, § 11378); (5) possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)); (6) robbery of Bendon Lee (Pen. Code, § 211); (7) battery of Charles Maroosis (Pen. Code, § 242); and (8) making a criminal threat to Mickey Lathum (Pen. Code, § 422). The jury also found true the allegation that defendant personally used a handgun during the commission of the crimes set forth in (1) to (3), above. Defendant was sentenced to an aggregate term of 14 years six months in state prison. He appeals his conviction, claiming prosecutorial misconduct, ineffectiveness of counsel, and insufficiency of the evidence. We will reverse defendant's conviction for attempted robbery of Jessie Rider and otherwise affirm the conviction.

I

Facts Relating to August 28, 2005, Incident

In August 2005, Joshua Johnson was living in a two-bedroom apartment with his girlfriend, Denise Galindo, their infant daughter, and two roommates: Jessie Rider and Devon McDermott. For income, Johnson sold marijuana from the apartment.

On August 28, 2005, defendant called Johnson on Johnson's cell phone, telling Johnson he wanted to buy three ounces of marijuana. Having sold to defendant 10-15 times before, Johnson

told him to come over. So, driving a pickup truck, Aorn Saechow drove defendant and a third man to Johnson's apartment, where Johnson met them at the curb. Defendant and the third man then followed Johnson to his apartment.

When the three men got to Johnson's apartment, Rider was in the front room looking through CD's, Galindo was on the front porch, and McDermott was sleeping in one of the bedrooms. Once inside the apartment, defendant began counting out his money and Johnson went to his bedroom to get the marijuana out of a locked safe.

Johnson went into the kitchen area with the marijuana and defendant asked to use the restroom. Defendant walked down the hall toward the restroom and then turned around, aimed a gun at Johnson, and said, "you're getting jacked." The man who came with defendant had his own gun and he pointed it at Rider, telling Rider to lie face down on the ground.

Johnson initially "froze" but quickly grabbed the marijuana and stuffed it in his underwear, covering it with his shirt. Defendant then turned to his cohort and said, "give me your nine," and started walking toward Johnson. While defendant was looking the other way, Johnson ran out of the apartment, down the stairs, out to the parking lot, and past the truck in which defendant had arrived.

Approximately 30 seconds later, defendant and his cohort ran out of the apartment, down the stairs, and out to the parking lot, where they jumped into the waiting truck. As the truck pulled away, it hit a pole; the bumper fell off and was

left behind, with the license plate attached. The police were called and shortly thereafter, Galindo and Johnson identified defendant as the man who had attempted to rob them.[1]

Defendant was arrested and a search of defendant's person revealed a .380-caliber round and a nine-millimeter caliber round of ammunition in defendant's left pocket. Both cartridges bore magazine marks indicating they had been loaded into a handgun. The search also revealed 20 Ecstasy pills and a cell phone in defendant's right pocket.

Defendant admitted stealing from Johnson, but told the police they "couldn't arrest him for ripping off a drug dealer." He also claimed the Ecstasy was for personal use and not for sale. Defendant was subsequently charged with one count of first degree residential burglary (Pen. Code, § 459--count one), two counts of attempted robbery (Johnson and Rider, respectively; Pen. Code, §§ 664/211--counts two-three), possession of a controlled substance (Health & Saf. Code, § 11378--count five), and being a felon in possession of ammunition (Pen. Code, § 12316, subd. (b)(1)--count six). It was further alleged that defendant used a handgun in the commission of counts one through three.

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[1] The roommates initially lied to the police, telling them defendant simply kicked in the front door and started waving a gun around, leaving out the fact that Johnson was selling drugs from the apartment. They later amended their story and explained that defendant was there to buy drugs from Johnson. Johnson was given immunity for his testimony.

A jury found defendant guilty on counts one through three, five, and six. The jury also found true the allegation that defendant had used a handgun during the commission of counts one through three. Defendant appeals, arguing prosecutorial misconduct, ineffective assistance of counsel, and insufficiency of the evidence. We find only one of defendant's claims has merit.

Discussion Relating to August 28, 2005, Incident

A. *Prosecutorial Misconduct*

In his closing argument to the jury, the prosecutor argued that Johnson's testimony proved that defendant intended to shoot Johnson to steal his marijuana. He further argued that the expert's testimony corroborated Johnson's account of events: "Doesn't that support exactly what Joshua Johnson said happened, that this defendant had a gun pointed at Joshua Johnson's face, and he attempted to shoot Joshua Johnson. But for whatever reason[,] a miracle happened to Joshua Johnson that day. Because the gun did not fire. So the defendant turned to his friend and said let me borrow your [nine-millimeter gun] so I can blow his brains out because he is not giving me the marijuana fast enough. And what [the expert] found supports exactly what Joshua Johnson testified to. So is that another coincidence?"

Defendant contends the argument resulted in prosecutorial misconduct because it was based on facts not in evidence. Specifically, he argues there was no evidence defendant said, "let me borrow your [nine-millimeter gun] so I can blow his

brains out . . ."; it was "conjecture" to argue defendant attempted to shoot Johnson; and it was conjecture to say that "a miracle happened to [] Johnson that day."

Defendant's failure to raise an objection and seek a curative admission forfeits any claim of error.[2] (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

B. *Ineffective Assistance of Counsel*

1. Defendant contends that his counsel's failure to object to the prosecutor's argument during closing, as set forth in part A of the Discussion, *ante*, constituted ineffective assistance of counsel. We disagree.

Johnson testified that defendant asked his cohort "for his nine." Johnson also testified he believed defendant intended to use that gun to shoot him. Because Johnson's testimony tended to show inferentially that defendant did try to shoot him, the prosecutor's statement constituted a permissible inference and a fair comment on the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

Moreover, Johnson's account was supported by the expert's testimony. A criminalist for the Sacramento County District Attorney's Office testified that the cartridges recovered from defendant's pocket showed magazine marks indicating they had been loaded into a handgun at some point. She further testified that one of the cartridges found in defendant's pocket had

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[2] Defendant's subsequent motion for a new trial on the basis of prosecutorial misconduct did not preserve the issue for appeal.

strike marks on it, indicating that someone may have attempted to fire it.

Based on the testimony of these two witnesses, it was reasonable for the prosecutor to argue that defendant attempted to shoot Johnson but the gun failed to fire. And, while it may be hyperbole, it was not unreasonable for the prosecutor also to argue that "a miracle happened to [] Johnson that day" when the gun failed to fire. Defendant's claim of ineffective assistance of counsel on this ground thus fails.

2. Defendant also contends that trial counsel was ineffective for failing to object to inadmissible testimony. Specifically, defendant argues that the expert testimony regarding whether the cartridges found in defendant's pocket had ever been loaded into a handgun and whether someone had attempted to fire those cartridges was superfluous and inflammatory. Accordingly, he claims, counsel should have objected to the testimony. We are not persuaded.

Assuming for the sake of argument that the expert testimony was inadmissible, "'"[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.)'

[Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Here, counsel was not asked for an explanation of his decision not to object to the expert's testimony.

Furthermore, "[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.)

"In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it 'produced a just result' [citation], we consider whether 'but for' counsel's purportedly deficient performance 'there is a reasonable probability the result of the proceeding would have been different.' [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) Here, there was no such reasonable probability.

The expert's testimony was not so inflammatory that its admission necessarily prejudiced defendant. This is especially so when considered in light of Johnson's testimony, which established that defendant aimed a gun at Johnson, then asked his cohort for another gun, and then demanded that Johnson give him the marijuana.

Consequently, even if the testimony was superfluous, defendant failed to establish that there was no rational tactical basis for counsel's decision not to object to the expert's testimony, or that there was any prejudice in the

admission of this evidence. Accordingly, we reject his claim of ineffective assistance of counsel on this ground as well.

C. *Insufficient Evidence*

Defendant further contends there was insufficient evidence to convict him of possessing ammunition and attempting to rob Jessie Rider.

On appeal, we "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*In re Michael D.* (2002) 100 Cal.App.4th 115, 126.)

1. *Possession of Ammunition*

Defendant argues there was insufficient evidence to convict him of possessing ammunition because there was no evidence the bullets found in his pocket were live rounds, *i.e.*, "'capable of being fired.'" Defendant misreads the expert's testimony and ignores the officer's testimony.

The prosecutor's expert testified that one of the cartridges indicated signs that someone may have attempted to fire it from a handgun. She nevertheless concluded the gun misfired; thus, the cartridge was not spent. When asked, she said it was possible one of the cartridges was "dead," but given the markings, it was more likely the gun into which it had been

loaded had misfired or the cartridge had been put into the wrong size gun. Sheriff's Deputy Andrew Miller also testified that he found two "live" rounds of ammunition in defendant's pocket.

Accordingly, even if Penal Code section 12316, subdivision (b)(1)[3] required that defendant be in possession of ammunition that was "capable of being fired," there is sufficient evidence the ammunition found in his pocket was capable of being fired, ergo, sufficient evidence to sustain his conviction.

2. Attempted Robbery of Jessie Rider

Defendant contends he cannot be convicted of attempting to rob Rider because the marijuana he was trying to steal belonged to Johnson. We agree.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) California follows "the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken." (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) "'Robbery is an offense against the person[.]" (*People v. Miller* (1977) 18 Cal.3d 873, 880.) Accordingly, a victim can be any person who shares "some type of 'special relationship' with the owner of the property sufficient to demonstrate that the victim had authority or responsibility to protect the stolen property on

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[3] Hereafter, undesignated section references are to the Penal Code.

behalf of the owner." (*People v. Scott* (2009) 45 Cal.4th 743, 753.) Persons with just such a special relationship include business employees and parents living with their adult children. (*Scott, supra,* 45 Cal.4th at pp. 752, 753-754; see *People v. Jones* (2000) 82 Cal.App.4th 485, 491.)

In *People v. Gordon* (1982) 136 Cal.App.3d 519, the defendants entered a residence by ruse, threatened a couple with a firearm, and took drugs and money belonging to the couple's absent adult son. (*Id.* at pp. 523-524.) The appellate court noted neither parent physically possessed the items taken nor did either know about the marijuana or money, and the only evidence to support a finding of possession was the couple's ownership and residence in the home where the crime occurred. (*Id.* at p. 529.) The court upheld the jury's determination that the parents were robbery victims who possessed their son's items for purposes of the robbery statute. (*Ibid.*) The court noted various individuals have been designated as victims in a robbery, such as a purchasing agent in charge of payroll, store clerks, barmaids, janitors in sole occupation of premises, watchmen, and gas station attendants. (*Ibid.*) "Clearly, if those individuals . . . were responsible for the protection and preservation of the property entrusted to them, parents have at least the same responsibility to protect goods belonging to their son who resides with them in their home." (*Ibid.*)

The evidence at trial established defendant attempted to steal marijuana from Johnson, saying, "you're getting jacked[.]" "Give [me] the weed." It was undisputed that Rider did not have

actual possession of the marijuana, and Johnson stored the marijuana locked in a safe in his bedroom. There was no evidence Rider, who had been living with defendant for only three to four months, had access to the safe. In fact, Rider did not even have a key to the apartment, most of the time coming and going only when someone else was home.

Unlike the victims in *Gordon*, there is no parent-child relationship between Johnson and Rider, nor was Rider an employee of Johnson's. Rider and Johnson were simply roommates. Thus, Rider had no obligation to protect Johnson's belongings. Furthermore, at the time of the robbery, Johnson was present to protect his own belongings and there was no evidence he expected Rider to assist him in that regard.

Lacking any evidence that defendant owned, had access to, control over, or an obligation to protect the marijuana defendant attempted to steal, defendant's conviction for attempted robbery of Jessie Rider cannot be sustained and we reverse the conviction.

II

Facts Relating to July 2, 2006, Incident

Around 8:00 a.m. on July 2, 2006, Benden Lee was shopping at the Auction City Flea Market. While looking at merchandise, from behind him, Lee felt a tug on his shirt and his necklace. Lee grabbed the necklace and his shirt with his hand and tried to hold on to the necklace, but the chain snapped, leaving a deep scratch on Lee's neck and tearing his shirt. Two people behind Lee then took off running.

Charles Maroosis was working as a supervisor in charge of security at the flea market that evening. He heard a radio transmission that a theft had occurred. About 15 seconds later, Maroosis saw defendant running toward him, knocking over a table of crystal as he ran. Maroosis asked defendant to stop, but defendant continued running and knocked Maroosis to the ground. Joined by several others, however, Maroosis was able to wrestle defendant to the ground and hold him. Defendant then bit Maroosis on the leg and told Maroosis that he had AIDS.

Mickey Lathum was also at the flea market that day, shopping with his wife. Defendant and another man ran past him. He saw defendant again at the entrance to the flea market, where he helped Maroosis and several others tackle defendant. Defendant told Lathum he had a gun and offered money to anyone who would help him get away.

Lathum testified that defendant's statements caused him to fear for his life until the police arrived. Lathum further testified that although his fear had dissipated since the event,

his fears were reignited when he received a subpoena compelling him to testify at defendant's trial, which caused him to fear retribution from defendant.

Defendant was subsequently arrested and charged with second degree robbery (§ 211), receipt of stolen property (§ 496, subd. (a)), two counts of making a criminal threat (Maroosis, Latham--§ 422), and battery (§ 242). It was further alleged that defendant had committed the crimes while out on bail. (§ 12022.1.) A jury found defendant guilty of second degree robbery, battery and making a criminal threat to Lathum.

Discussion Relating to August 28, 2005, Incident

A. *Robbery of Bendon Lee*

Defendant contends there was insufficient evidence to convict him of robbing Lee; namely, that when he stole Lee's necklace, he used no more force than was necessary to take the object, and thus there was insufficient evidence to convict him of robbing Lee--that his crime was akin to "'grabbing or snatching property.'" Defendant misunderstands the law in this regard.

Robbery requires the taking of property from another by force or fear. (§ 211.) It is accurate to say that to elevate a taking from theft to robbery, "something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139; accord, *People v. Jackson* (2005) 128 Cal.App.4th 1326, 1331.) Such cases are, as defendant

refers to them, a "classic 'snatch.'" But that is not what occurred here.

Here, there is no dispute that when defendant pulled Lee's necklace, Lee grabbed the necklace and pulled back in an effort to protect his property. In the struggle, the necklace broke, Lee sustained a deep cut on his neck, and his shirt was torn. That is certainly more force than was required to take the necklace. Accordingly, we find sufficient evidence to sustain the conviction.

B. *Criminal threat*

Defendant also contends that his conviction for making criminal threats to Lathum in violation of section 422 must be reversed because it is not supported by substantial evidence.

In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the judgment to see if it contains reasonable, solid evidence (contradicted or uncontradicted) from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Castro* (2006) 138 Cal.App.4th 137, 140.)

Section 422 provides in part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is

so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Defendant contends there is "[i]nsufficient evidence to support a conviction on this count as 1) there was no threat, 2) if there was a threat, there was no immediacy to such being consummated, 3) there was no sustained fear, and 4) any fear by [Lathum], beyond some momentary concerns, was unreasonable." We are not persuaded by defendant's argument.

"[T]he determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific [that] they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) "[I]t is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

Here, Lathum observed defendant running through the flea market, shoving another man out of his way. Coming at Lathum, defendant raised his left hand to Lathum's chest,

presumably to shove him away, and Lathum grabbed defendant's left hand to stop him. At that point, defendant told Lathum he had a gun. Lathum believed him, and with defendant's other hand free, Lathum believed defendant intended to shoot him. Under the circumstances, it is apparent defendant intended Lathum to feel threatened so Lathum would let defendant go. And with one hand free, defendant had the ability to carry out his threat.

Moreover, unlike the victim in *In re Ricky T.* (2001) 87 Cal.App.4th 1132, who went back to teaching his class after sending Ricky T. to the principal's office, Lathum testified that, until the police arrived, he continued to fear defendant would harm him. (*In re Ricky T., supra,* 87 Cal.App.4th at p. 1140.) Thus, there was uncontroverted evidence that Lathum's fear was neither momentary nor fleeting.

Defendant contends that any fear Lathum may have felt when defendant claimed to have a gun should have dissipated as defendant pleaded to be let go, offering to pay money to anyone who would help him escape. Defendant ignores the impact of his behavior after he was stopped by Lathum and the other men.

After Lathum and the others stopped defendant, he continued to fight them, attempting to get away every time they loosened their grip on him. And, as to defendant's offer to pay money to anyone who would help him, Lathum believed defendant intended that as an offer to pay someone to harm Lathum. In fact, believing someone in the crowd might accept defendant's offer, Lathum called out to his wife and asked her to take a mental

picture of the crowd. Given the circumstances, it was not unreasonable for Lathum to remain in fear for his safety.

DISPOSITION

Defendant's conviction for the attempted robbery of Jessie Rider (count three of the information) is reversed. The judgment is otherwise affirmed and the matter is remanded for the limited purpose of recalculating defendant's sentence in light of this court's decision to reverse the conviction on count three. After resentencing, the trial court is directed to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

DAVIS, J.*

We concur:

SIMS, Acting P. J.

HULL, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.